IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. KATHY WALKER, Appellant.	)	No. 63441-1-I UNPUBLISHED OPINION FILED: July 26, 2010

Schindler, j. — In order to establish prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. Kathy Walker's claim of prosecutorial misconduct fails because the challenged comments, when viewed in context, are either not misconduct or so minimally prejudicial that there is no likelihood they affected the jury's verdict. Accordingly, we affirm her conviction for two counts of first degree animal cruelty.

FACTS

The State charged Kathy Walker with two counts of first degree animal cruelty after animal control officers found two dead puppies in her back yard. At trial, the State presented evidence that on the afternoon of September 30, 2007, a woman who identified herself as "Gloria Johnson" called the Seattle Animal Shelter and told the receptionist that she had seen a dead dog in her back yard that needed to be picked up. The caller said she lived at 947 23rd Avenue and indicated that the dog

belonged to "Linda and Cliff," two homeless persons who had left the dog with her about a week and a half earlier. The caller also provided her telephone number.

About 30 minutes later, Terry Nemins, an animal control officer, went to the residence and knocked on the door. When no one answered, Nemins left a message on the door with contact information. Nemins later left a voice message for the caller, indicating that she had been out to pick up the dog but that no one was home.

On October 2, 2007, an animal control officer left another voice message, asking if the caller still needed the dead dog picked up. About one hour later, in response to the message, "Gloria Johnson" called the Shelter and said she still needed the dog picked up. When informed that she had to be present to sign a release, Johnson said she would be home after 5:15 p.m.

Shortly after 6:00 p.m., animal control officer Susan Adams went to the house, where she encountered a young girl who said her name was "Ashley Johnson." The girl told Adams that her mother was at the gym and that the officer could take the "dogs."

Adams then discovered there were two dead dogs in the back yard: a black puppy, lying in a bassinet, with its leash attached to the bumper of a nearby jeep; and a brown puppy in a wire cage on the other side of the jeep. Both animals appeared severely emaciated. A veterinary pathologist determined that both dogs had died from starvation at about the same time. Neither animal showed any signs of disease or external trauma,

In the following days, animal control officers left voice messages and attempted to contact the caller several times. Gloria Johnson left two voice messages in response, but officers were never able to speak with her.

Michael Bekele, the owner of the house at 947 23rd Avenue, testified that he rented the house to Kathy Walker from 2004 until October 2007. According to Bekele, Walker abandoned the house around the end of September 2007 without notice and without leaving a forwarding address. While cleaning the house, Bekele found dog hair on a comforter, dog food in the kitchen, dog feces in the basement, and what appeared to be stains from a dog on the upstairs floor.

Danny Brown, a neighbor, testified that during the summer of 2007, he frequently saw a brown puppy tied to the front railing of Walker's house. The dog barked constantly. Several times, Brown saw Walker's daughter bring the dog from inside the house and tie it to the front porch. On one occasion, Brown saw the puppy in Walker's back yard, where Walker picked up the dog, placed it in a metal cage, and then put a blanket over the cage.

Thomas Kiehne lived directly behind Walker's house. During the summer of 2007, Kiehne frequently heard a dog barking during the day on Walker's property. At one point late in the summer, the dog started to make a high pitched yelp, which Kiehne characterized as "desperate." Looking into Walker's yard, he saw a small brownish dog tied to a car in the back yard. Kiehne told Walker's daughter that there appeared to be something wrong with the dog.

Lambert Rochfort worked for an agency that provided various social services

to individuals receiving assistance from the Department of Health and Social Services (DSHS). Rochfort testified that from September 2007 through February 2008, his agency provided a voice mail telephone number for Kathy Walker. The telephone number was the same number that "Gloria Johnson" provided to the animal shelter.

On February 2, 2008, Walker met with shelter officers for the first time. During the interview, Walker claimed that the two dogs were owned by two homeless women, "Gloria Johnson and Joanne." Walker allowed the women to leave the dogs in her yard, but understood they would care for the dogs. The women eventually abandoned the animals, and Walker felt she could not afford to properly care for the dogs.

The jury found Walker guilty as charged, and the court imposed a sentence of 240 hours of community service.

DECISION

Walker contends the deputy prosecutor violated her right to a fair trial when he committed multiple acts of misconduct during closing argument. She therefore bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). A failure to object waives any claim of error unless the comments were so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. State v.

Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

Res Ipsa Loquitur

Walker contends that the deputy prosecutor committed misconduct when he twice referred, without objection, to res ipsa loquitur:

> Now, let me talk a little bit about the black dog. We don't really know a lot about this black dog. Most of the testimony in this trial has sort of centered on the brown dog. There's an old saying in the law that comes from the Latin and the saying is, 'Res ipsa loquitur.' And you may have heard this. It literally means the thing speaks for itself.[1]
>
> What we do know is that this black dog was starved to death just like the brown dog. We know the black dog was found next to the brown dog. Like the brown dog, the black dog was not free. The brown dog -- excuse me, the black dog had been tightly leashed to the door handle of Ms. Walker's Jeep. In fact, the testimony was the leash was wrapped around her body. And the black dog died at about the same time as the brown dog. [RP 3-3-2009, at 25]

When the deputy prosecutor completed this portion of his argument a short time later, he repeated the meaning of "res ipsa loquitur." Walker argues that the reference to the tort concept of res ipsa loquitur effectively relieved the State of its burden of proof and suggested that the charged offenses were strict liability crimes.[2]

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[1] (Emphasis added).

[2] "[T]he doctrine of res ipsa loquitur provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury." Metro. Mortgage & Sec. Co., Inc. v. Washington Water Power, 37 Wn. App. 241, 243, 679 P.2d 943 (1984).

But when the two references to res ipsa loquitur are viewed in context, it is clear the deputy prosecutor was arguing only that the circumstantial evidence supported an inference that the black puppy starved to death at about the same time as the brown puppy and under similar conditions. The deputy prosecutor relied solely on the literal meaning of res ipsa loquitur and did not suggest that the concept affected the State's burden of proof.[3] The trial court properly instructed the jury that the State had the burden of proving all elements of the offense beyond a reasonable doubt. The challenged comments did not relieve the State of its burden of proof.

We do not find the concept of res ipsa loquitur to be particularly helpful to the jury in a criminal case, and any attempt to invoke its legal meaning would be problematic. But under the circumstances here, Walker has not demonstrated that the brief references misled the jury or that they were otherwise improper. And in any event, any potential prejudice arising from the brief reference could easily have been neutralized with a curative instruction.

[3] "[The doctrine of res ipsa loquitur] casts upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence." Id.

Where There's Smoke, There's Fire

Walker contends that the deputy prosecutor committed misconduct by asserting that "[w]here there's smoke, there's fire." After summarizing the various unsuccessful attempts to contact Walker, the deputy prosecutor argued:

> Now, the reason we go into this, where there's smoke, there's fire. Where there's deception, there is guilty knowledge. [RP 3-3-2009, at 21]

The trial court overruled defense counsel's objection that this was "improper argument."

Walker claims that like the reference to res ipsa loquitur, this comment was an improper attempt to relieve the State of its burden of proof. As with res ipsa loquitur, the comment could be misleading under certain circumstances. But here, the phrase merely reinforced the deputy prosecutor's argument that the unsuccessful attempts to contact Walker and Walker's abandonment of her residence, without leaving a forwarding address, "reflect consciousness of guilt." [RP 3-3-2009, at 21]. Viewed in context, the remark was not improper and did not relieve the State of its burden of proof. The deputy prosecutor is afforded wide latitude during closing argument to draw and express reasonable inferences from the evidence. See State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

Abomination

Walker contends that the deputy prosecutor improperly appealed to the jury's passion or prejudice when he referred to the crime as an "abomination." [RP 3-3-2009, at 51] The trial court overruled defense counsel's objection.

An appeal to the passion or prejudice of jurors is improper. See State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). But the prosecutor may properly characterize the nature of the crime. See State v. Borboa 157 Wn.2d 108, 123, 135 P.3d 469 (2006). "'A prosecutor is not muted because the acts committed arouse natural indignation.'" Id. (quoting State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968). Walker has not demonstrated that the single reference to "abomination" constituted misconduct. See Borboa, 157 Wn.2d at 123 (references to the "horrible" nature of the crime and the effect on its victims did not constitute misconduct).

Arguing Facts Not in Evidence

Finally, Walker contends the deputy prosecutor improperly relied on facts not in evidence when he suggested that one dog had died as of September 30, 2007, when "Gloria Johnson" called the animal shelter, and that "by the time Officer Adams got there, the second dog had died." [RP 3-3-2009, at 26]. But in her initial call on September 30, 2007, "Gloria Johnson" had referred only to a single dead dog. On October 2, 2007, animal control officers found two dead puppies in Walker's back yard. Under the circumstances, including the nature of the puppies' death, the evidence was sufficient to support a reasonable inference that the second dog died

in the period between September 30, 2007 and October 2, 2007.

Affirmed.

Schindler, J.

WE CONCUR:

Leach, A.C.J.

Becker, J.